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CONFUSION IN APPLYING LAST CLEAR CHANCE DOCTRINE.

Some confusion seems to have arisen in the application by the courts of the last clear chance doctrine. Some of this could possibly be avoided if this doctrine were not considered an exception to the contributory negligence rule. Some courts have stated that this doctrine is an exception to the contributory negligence rule, and in some cases in which it is so stated, the courts have in reality not so treated it.

Contributory negligence is some act or omission on the part of the plaintiff, amounting to a want of the required degree of care, which concurring with and contributing to the negligence of the defendant, proximately causes the plaintiff injury. It is not the act of the plaintiff that contributes to his injury which bars him of recovery, but rather his negligence. These are not always the same.

It will probably be found that in all cases in which the negligence of the plaintiff contributed as a proximate cause to produce his injury, the courts have denied him the right to recover, even under the last clear chance doctrine. It is only in cases where the plaintiff's negligence does not constitute a part of the proximate cause of his injury that he is allowed to recover. Hence, the doctrine of last clear chance involves simply the question of proximate cause, and this question is no different when the facts pleaded bring the case under this doctrine than when in any case the questions of negligence and contributory negligence are involved. The idea that "concurring negligence," so often referred to in cases involving this doctrine, is something different than contributory negligence is a mistake. Whenever the negligence of plaintiff in any given case comes within the definition of contributory negligence, it defeats his action, without regard to whether there is involved the last clear chance doctrine or the doctrine of contributory negligence.

The case generally referred to as the one first applying the last clear chance rule, is the one where the owner of a donkey, negligently permitted it to stroll at large upon the highway, and it was injured by a traveler who could have avoided injuring it by the exercise of ordinary care. It might be said that the negligence of the owner of the donkey continued all of the time that the donkey was at large in the highway, but it is clear that his negligence was not the proximate cause of the injury. Permitting the donkey to go into the highway was a negligent act or omission, and if the donkey had not been in the highway he would not have been injured. But the negligence of the plaintiff as a contributing proximate cause to the injury had ceased, and the negligence of the defendant was considered the sole proximate cause thereof. A similar case in principle is that of a tramp who lies down upon a railroad track and falls asleep, and is hit by a train, the crew of which could have avoided the accident by the exercise of ordinary care after discovering him. The act of the tramp continued as a contributing cause of his injury until he was struck by the train, but his negligence as a proximate cause of his injury had ceased to exist.

Some cases have held that the plaintiff must have been oblivious of his danger in order to recover under the last clear chance doctrine. This, however, cannot be stated as a general rule, and has application only when the particular facts of the case warrant. Obliviousness, on the part of the plaintiff, may be important and even vital in a case where the defendant may have had the right to assume that the plaintiff would remove himself from the zone of danger before being injured.

In such a case if it is apparent to the defendant, or ought to be apparent to him that the plaintiff is oblivious of his danger, then this takes away the defendant's right to rely upon the assumption that the plaintiff will take himself out of the way of danger before it is too late. Hence, obliviousness merely affects the question of whether or not after the danger of the plaintiff was or ought to have been apparent to the defendant, the latter could have avoided injuring the plaintiff by the exercise of the required degree of care.

NOTES OF IMPORTANT DECISIONS

RECENT DECISIONS IN THE BRITISH COURTS

What is the effect of a special contract on the common law liabilities of a carrier? That was the subtle and highly important question discussed by the Court of Appeal in Great Northern Ry. Co. v. L. E. P. Transport and Delivery Co.[1] To the consideration and decision of it the judges have given great care and their opinions are deserving of study for their statement of the development of the common and statute law of carriage.

A common carrier is just a person who professes himself ready to carry for everybody. The liability of a person who makes a public profession of that sort is fixed by the custom of the realm as being that he is the insurer of the goods carried by him with certain limited exceptions. Carriers, however, began very soon to add limitations to their liability as insurers either by a general notice or by a special contract. In the case of special contracts the limitations got to such a stage and particularly in the case of railways that in 1854 Parliament said "all railway companies must carry; they may limit their liability by special contracts if they are signed by the consignor and if they are just and reasonable, but no terms which free the company from liability for negligence of its servants shall be taken to be just and reasonable." Continually during that process of carriers attempting to limit their liabilities and the imposing liabilities by Parliament, this sort of question arose: "You have made a special contract limiting your liability in a particular respect—what is the rest of your liability? Is the common carrier's liability still left except in so far as you have limited it by the contract, or is the position that as you have not accepted the full common carriers' liability you are merely a bailee carrying for rewards and are only liable for negligence."

Prior to the recent decision which has now been given the leading case was Baxendale v. Great Eastern Railway Co.[2] That company was carrying pictures from Antwerp to London and they had a bill of lading which contained considerably larger exceptions to liability than that of common carriers under the custom of the realm. But the goods being pictures, they wanted the protection of Section 1 of the Carriers Act of 1830, to which the answer was, "You are not common carriers because you have entered into a special contract, and the fact that you have made a contract which varies a common carrier's liability prevents you from being common carriers at all."

A court of seven judges held that the mere fact that in one respect the company had freed itself from liability as common carriers did not necessarily or naturally involve that they ceased to be common carriers as to other matters. Prima facie, they remained common carriers except in the respect in which they had varied their liability by special contract.

In the case we are now discussing Baxendale's case was reaffirmed, and accordingly the law on the question may now be accepted as this, namely, that in each particular case we must look at the terms of the contract to see whether they are such that the whole of the common carrier's liability is excluded or whether it is only that in a certain portion it is varied; and varying the common law liability in one respect does not exclude the rest of the common carriers' liability.

Now, in the action by the Great Northern Railway above referred to, it had happened that that company had paid damages for goods which had been injured in transit, and they were suing for recovery of the amount so paid from the defendants whom they alleged to be in fault. Mr. Justice Horridge had held, that the company's consignment contract only made them liable for negligence, and that as they had not been negligent they need not have paid the claim and therefore could not recover it. On appeal, as we have indicated, this decision was reversed and it was laid down that the fact that the company under their contract was only liable for negligence, did not exclude their liability otherwise as common carriers; that as common carriers they were bound to pay the damage, and were now entitled to recover.

(1) 38, T. L. R. 711.

(2) L. R. 4, Q. B. 244.

As the important question discussed in Cantiere San Rocco S. A. (Shipbuilding Co.) v. Clyde Shipbuilding and Engineering Co., Ltd.,[3] will likely go to the House of Lords, we shall just state here the decision taken by the majority and minority judges in Court of Session. The case arose out of a contract by the Scottish engineering company to make and deliver to an Austrian company a set of marine engines—as regards certain parts on or before February 15, 1915, and as regards the remaining parts on or before April 30, 1915. The contract was completed by the signature of the parties on May 4, 1914, and immediately passed into the stage of performance. The contract price was £11,550 but of this amount a first installment of 20 per cent was payable by cash in London on signing the contract. Accordingly the Austrian buyers on May 20, 1914, paid a sum of £2,310 to the makers. The contract also contained a number of detailed provisions—to be carried out immediately on the contract being signed—with regard to the submission on the part of the makers, and the adjustment by the Austrian company, of drawings, plans, and details necessary for regulating the construction of the ship suitably for the reception of the engines when delivered. These provisions were duly implemented by the makers before August 12, 1914, when war was declared between this country and Austria; but no part of the engines had been made or put together by that date, with the result that no property in the engines or in any part of them had passed to the Austrian company.

The effect of the outbreak of war between the countries of which the makers and the buyers were respectively nationals—while the contract was in course of performance—was to render further performance of it illegal, as involving intercourse with the King's enemies, and as being detrimental to the interests of the makers' country, and so to exonerate or discharge the parties from their respective obligations for such further performance, but whatever rights had accrued under the contract before the outbreak of war remained unaffected except that the right to sue in respect thereof was suspended during the war. While the contract was discharged as regards further performance, it was not wholly annulled. This was accepted as the law applicable to the case of supervening war conditions in this court in the case of Penny v. Clyde Shipbuilding and Engineering Co., Ltd.,[4] and is in accordance with the decisions and opinions in a number of cases in the English Courts and in the House of Lords, of which it is enough to mention Zinc Corporation v. Hirsch[5] and Ertel Bieber & Co. v. Rio Tinto Co., Ltd.[6]

The present action was brought by the Austrian buyers—now an Italian company—for refund of the installment of price paid on May 20, 1914. The majority of the Court of Session have adopted the view taken by Lord Justice Romer in Chandler v. Webster,[7] where he stated the law in general terms: "Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and through no default by either party and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded ad initio any payment previously made and any legal right previously accrued according to the terms of the agreement will not be disturbed." The minority have adopted the opinion of Lord President Inglis in Watson & Co. v. Shankland:[8] "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a condictio causa data cause non secuta, or a condictio sine cause, or a condictio indebiti, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts."

There is thus disclosed a difference on a point of law of great importance, the solution of which is not easy, and the final decision will be awaited with interest.

Glasgow, Scotland. DONALD MACKAY.

(3) 1922, S. L. T. 479.
(4) 1919, S. C. 363.
(5) 1915, 1 K. B. 541.
(6) 1918, A. C. 260.
(7) 1904, K. B. 493.
(8) 1871, 10, M. 142, at p. 152, affd. 11 M. (H. L.) 1.

INJURY BY ROBBERY AS "ARISING OUT OF EMPLOYMENT."—The cases decided in the various jurisdictions under the Workmen's Compensation Acts seem to hold that the correct test is whether or not there is a casual connection between the injury and the employment; in other words, whether they are so closely connected that the injury can reasonably be said to have resulted naturally from the employment.

In the comparatively recent case of Spang v. Broadway Brewing & Malting Co. (182 A. D., 443) an employee of a brewing company was killed while on a collecting trip on behalf of the company, the killing resulting from an attempt to rob him. It was held that he was killed in the course of his employment, and that the killing grew out of his employment, and a recovery was accordingly allowed. The Court said:

"The fact that the death of Spang was intentionally caused does not defeat the claim. He was killed as an incident of his employment because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and willfully by a third party may be 'an accidental injury' within the meaning of the act from the viewpoint of the employer and the employee—citing a number of cases."

A similar question was recently decided by the Supreme Court of Colorado, in the case of Industrial Commission of Colorado v. Pueblo Auto Company (207 Pacific Reporter, 479, Advance Sheets of August 14, 1922). In that case a salesman for an automobile company was killed by robbers while driving into the country for the purpose of selling an automobile. The Court held, in a three to two decision, following the Spang case in New York (supra), that the injury was compensable as arising out of the salesman's employment and was within the protection, therefore, of the Workmen's Compensation Act. The main argument advanced by the Court in support of its conclusion is that the danger of assault upon a highway for the purpose of robbery is generally recognized as a risk of traveling, and is more imminent in recent years, since the possession of an automobile affords a ready means of escape.

Material portions of the Court's opinion, written by Mr. Justice Teller, read as follows:

"The arguments of counsel on both sides turns upon the question whether the assault upon Parks was a hazard special to his employment. Many cases are cited in which injury suffered from robbery of bank messengers and paymasters have been held to be compensable under these compensation acts. While it has been stated that these laws cover only dangers which might have been anticipated, yet the cases generally hold that if, after the injury, it can be seen that the injury was incurred because of the employment it need not be such as to have been anticipated. We think that it is the better rule.

"The award of the commission can be sustained only on the ground that Parks lost his life while he was in the course of his employment and as the result of an attempt upon the part of the Boscoes to obtain possession of the employer's automobile.

"The danger of assault upon a highway for the purpose of robbery is generally recognized, and said danger is more imminent in recent years, since the possession of an automobile affords ready means of escape.

"This court has held that an accident sufferred by an employee while riding in an automobile to reach the place of his employment is compensable, and the only question is whether or not the danger of assault for the purpose of robbery is as generally recognized as is the danger from collision or other accidental injuries to automobiles and their occupants. If not as evident, is the danger so evident as to make it fairly a risk of traveling on the highway?

"That such travel is subject to the danger of assault for the purpose of robbery is not to be denied in view of the frequent reports of such assaults.

"Many of the cases cited are extremely liberal in applying these compensation laws to injuries of this general class. Some of them have gone so far as practically to eliminate the question whether or not the injury grew out of the employment, making it sufficient that it was suffered in the course of the employment. We do not feel at liberty to go that far and practically to amend the law, and we are not required to do so in this case. There is ample authority for holding that an injury inflicted in an attempt to rob an employee while in the course of his employment is compensable as arising out of such employment. * * *

"It being established that Parks was killed in order that his assailant might obtain his employer's automobile in which Parks was riding on his master's business, we are of the opinion that the commission was justified in awarding compensation to the claimant."

LEVER ACT AUTHORIZING FIXING OF COAL PRICES HELD VALID.—In its opinion in Ford v. United States, 281 Fed. 298, the Circuit Court of Appeals for the Sixth Circuit, upholding the provisions of the Lever Act authorizing fixing of coal prices, the Court said:

"The constitutionality of section 25 of the act is vigorously assailed on several grounds; the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive orders is pro-

vided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the Cohen Case, 255 U. S. 81. 89, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045, which held section 4 of the act (section 3115⅛ff) invalid; and the instant case is not affected by that decision.

"As to the second criticism: While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below (265 Fed. 424) that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process (Moyer v. Peabody, 212 U. S. 78, 84, 29 Sup. Ct. 235, 53 L. Ed. 410), and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by article 1, § 8, of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated.

"Our conclusion that section 25 of the Lever Act is valid is confirmed by the many recent decisions of the Supreme Court sustaining the exercise of war powers: as in the McKinley Case, 249 U. S. 397, 398, 39 Sup. Ct. 324, 63 L. Ed. 668, where was sustained a regulation of the Secretary of War, made under the authority of Congress, forbidding the keeping of houses of ill fame within a certain distance of military camps; the War-Time Prohibition Case, 251 U. S. 146, 160, 40 Sup. Ct. 106, 64 L. Ed. 194, holding that the exercise of the power to prohibit the liquor traffic as a means of increasing war efficiency was within the war power of Congress; Ruppert v. Caffey, 251 U. S. 251 U. S. 146, 160, 40 Sup. Ct. 106, 64 L. Ed. 260, which sustained the prohibition against liquors containing one-half of 1 per cent. of alcohol, even though not in fact intoxicating; the Selective Draft Cases, 245 U. S. 366. 377, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas.1918B, 856; and the Espionage Cases of Schneck v. U. S., 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561, and Debs v. United States. 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. In several of the cases cited the Lever Act is referred to, and, to say the least, without apparent question of its validity generally."

For opinion of the lower court, see 263 Fed. 449. See also 265 Fed. 424.

STATUTE FORBIDDING SALE OF MILK COMPOUND UPHELD.—The case of State ex rel. v. Emery, 189 N. W. 564, decided by the Supreme Court of Wisconsin, holds that a statute prohibiting the sale of milk products to which have been added any fat or oil other than milk fat, enacted for the purpose of preventing the manufacture and sale of compounds which could be sold in a deceptive manner, is a constitutional exercise of the police power. As applied to food, this case holds that the authority of the police power extends to requiring a fixed minimum amount of nutritional elements, and that the State has power to protect its industries in markets in other States as well as in its own markets. We quote as follows from the opinion of the Court:

"The police power also has an especially appropriate field of action in the prevention of fraud and deception. Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. It may be legitimately exercised against even the occasional fraud not inherent in the business or product and a fortiori against the fraud that is inherent in it. Merrick v. Halsey Co., 242 U. S. 568, 37 Sup. Ct. 227, 61 L. Ed. 498. It extends farther, and embraces the right to prohibit all things which constitute obstacles to a greater public welfare (Rast v. Van Deman & Lewis, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421 Ann. Cas. 1917B, 455), and to do whatever will promote the general convenience or the general prosperity (Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499), including even such matters as the preservation of the reputation of a great industry of the state against injury in markets outside of the state (Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 845).

"Given a legitimate subject for the exercise of the police power, it is for the Legislature to adopt such measures as it may deem necessary to make its action effective, so long as they have reasonable relation to that end. Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.

"The measures which the Legislature may adopt for such purpose may be either regulatory or prohibitory, whichever the Legislature deems the more effective method of accomplishing the result (Silz v. Hesterburg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75), and they may be either in the form of general directions or of detailed measures against a particular article (Price v. Illinois, 238 U. S. 448, 35 Sup. Ct. 892. 59 L. Ed. 1400).

"Accordingly the authority of the Legislature to prohibit an article is not affected by the fact that the article may be truthfully labeled (Hebe Co. v. Shaw, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255), or that the law will result in destroying the value of property devoted to the manufacture of such article."

BASIS OF INCOME TAX PAYABLE ON SALE OF STOCK ACQUIRED BEFORE STATUTE TOOK EFFECT.—A statute of Massachusetts imposes an income tax on the excess of gains over losses received from purchases or sales of intangible personal property.

This statute went into effect January 1, 1916. It is held in Brown v. Long, 136 N. E. 188, decided by the Supreme Judicial Court of Massachusetts, that where stock on January 1, 1916, was worth less than its previous cost, only the difference between the cost and the selling price is taxable as income; a provision of the statute that the value on January 1, 1916, shall be the basis of determination, only applying when the value on that date is in excess of the value of the original investment made before that date. A part of the opinion by Chief Justice Rugg, is as follows:

It is manifest that the actual increase in wealth which came to the complainant out of this transaction in stock did not exceed the difference betwen the cost to him when he bought and the price received when he sold. The circumstances that on January 1, 1916, the market value of the stock was much less than he paid is an immaterial factor in ascertaining his actual material profit. His investment had been made long before that date at a higher price. He made no purchase on that date.

"The excess of gains over losses made subject to taxation by Section 5 cannot be more than the actual gain above the original investment, whether that was made before or after January 1, 1916. The terms of Section 7 afford the means of calculating the gain on a sale for a price in excess of the value on January 1, 1916, when that value is in excess of the value of the original investment made before that date. The tax law in this respect avoids difficulties pointed out in Tax Commissioner v. Putnam, 227 Mass., at page 529, 116 N. E. 904, L. R. A. 1917F, 806.

"This result is in harmony with the interpretation given to corresponding provisions of the federal income tax law. Goodrich v. Edwards, 255 U. S. 527, 41 Sup. Ct. 390, 65 L. Ed. 758; Walsh v. Brewster, 255 U. S. 536, 41 Sup. Ct. 392, 65 L. Ed. 762."

ATTEMPT TO FORM COMMON LAW TRUST RESULTING IN PARTNERSHIP.—In Neville v. Gifford, 136 N. E. 160, the Supreme Judicial Court of Massachusetts holds that a so-called agreement and declaration by which an association was created to take the title to land and dispose of it as building lots, and which attempted to exempt the trustees and shareholders from personal liability, but which made the trustees managing agents, subject to the control of the shareholders, created a partnership relation among the shareholders, rather than a pure trust. DeCourcy, J., wrote the opinion, and in part said:

"The 'agreement and declaration of the real estate investment association' in our opinion creates a partnership relation among the certificate holders as distinguished from a pure trust. It provides that shareholders may hold meetings, increase or diminish the number of trustees, remove any trustees except the original two, fill vacancies in the board, and modify or alter the trust, 'except that no such modification or alteration shall affect the exemption of trustees, officers and shareholders from personal liability or affect the relative rights of holders of outstanding preferred common shares or outstanding contracts or obligations'. A majority in interest of the shareholders are authorized to terminate the trust at any time prior to that limited for its duration; by liquidation, or by conveyance of the property absolutely or under a new 'declaration of trust'. The instrument was prepared by Leon, and its provisions are more or less conflicting. But, considered as a whole, it makes the property subject to the control of the certificate holders; and the trustees are merely managing agents and not principals. Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Frost v. Thompson, 219 Mass. 360, 365, 106 N. E. 1009; Priestley v. Treasurer and Receiver General, 230 Mass. 452, 120 N. E. 100."

AUTOMOBILE COLLISION INSURANCE.—The case of Southern Casualty Company v. Johnson, 207 Pac. 987, decided by the Supreme Court of Arizona, holds that a policy insuring an automobile against collision does not cover damage resulting from the overturning of the automobile when it ran up onto a bank at the side of the road and overturned without colliding with any object. It further holds that such a policy covers damages which resulted when the automobile overturned if the cause of the upset was a collision. We quote at considerable length from the opinion of the Court:

"The concusion reached, therefore, is determinative of the insurer's liability, because recovery is sought solely under the provision of the policy rendering the insurance company liable for damage to the automobile "by being in accidental collision * * * with any other * * * object," and necessarily a finding that 'the automobile accidentally collided with an embankment of earth, * * * and as a result thereof it was damaged,' establishes liability, while a finding that the damage resulted from an upset or tip-over caused by the automobile's being run 'upon and along or over' an inclining embankment, as claimed by appellant, would not, according to the authorities, bring the accident among those insured against, for the reason that an upset and collision are not regarded as the same. This question was discussed as follows by the Supreme Court of Wisconsin in Bell v. American Insurance Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179. where the testimony disclosed that the driver of an automobile was endeavoring to turn his car, and, while doing so backed it upon soft ground where it gradually settled and tipped over:

"'While it is true that insurance contracts should be construed most strongly against the insurer, * * * yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule [of construction] that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an accident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset could be construed as a collision in the absence of a closer association of the two incidents in popular understanding.'

"To the same effect are the following: Moblad v. Western Indemnity Co. (Cal. App.) 200 Pac. 750; Stuht et ux. v. United States Fidelity & Guaranty Co., 89 Wash. 93, 154 Pac. 137.

"However, an upset or tip-over resulting in damage may itself be caused by a collision, and, where this is true, the insurer is just as liable under an 'accidental collision policy' as though the damage had resulted directly from the collision, because the injury to the car is as much due to the collision, though indirectly, as if the upset had not occurred. Even in those policies containing a provision excluding damage resulting from collision, due wholly or in part to upsets, a recovery cannot be defeated where the upset is the result of a collision. 14 R. C. L. 1274; Harris v. American Casualty Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846. Such a 'policy does not mean that where a collision has first taken place there can be no recovery because as the result of the collision the machine is upset.' Babbitt on Motor Vehicles (2d Ed.) par. 788; Universal Service Co. v. American Insurance Co., 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183.

"As used in this policy, the word 'collision' has its usual meaning of 'striking together, or striking against,' and includes the case of an automobile striking against any other object, whether that object be standing or in motion, or whether it be another automobile, vehicle, some similar object, or something altogether different, because the rule of ejusdem generis does not apply, but rather the exception to it, which gives general words following particular words including all of their class a meaning different from that of the specific words."

"What caused his death?"

"A broken neck."

"How's that?"

"Oh, he was in the hospital with lumbago, and the nurse rubbed his back with alcohol—and he broke his neck trying ot lick it off."—Orange Peel.

GOVERNMENTAL REPUDIATION—COMMUNTATION TICKETS.

A statute should not be interpreted to include a transaction which is only ambiguously, if at all, within its scope, and which furthermore if within its scope, would involve repudiation. 38 L. Q. R. (Eng.) 10, cf. U. S. v. Field, 255 U. S. 257.

Prior to the Transportation Act of 1920, Feb. 28, 1920, c. 91, 41 Stat. 456, the Interstate Commerce Commission of the United States had authorized the issuance by railroads of commutation tickets[1] "good for bearer and good until used." This Transportation Act of 1920 (by its section 422, 41 Stat. 488), added to the Interstate Commerce Act of Feb. 4, 1887, c. 104, section 15a. This section 15a empowered the Commission to "initiate, modify, establish or adjust" rates. Thereafter, the Commission authorized or ordered not only a general increase in passenger (58 I. C. Rep. 220, 242) rates, but the cancellation of previously issued commutation tickets,[2] "on a pro rata basis"—without interest.

The commutation contract is not a rate, though the definition of rate, in sec. 15a (1), supra, is broad, including "rates, fares and charges, and all classifications, regulations and practices relating thereto." It is true that in Louisiana & Nashville R. R. Co. v. Motteley, 219 U. S. 467, 476-480, a pass could not be paid for, by releasing a claim for damages, since "rates or charges" were payable only in money. But this does not forbid the use of commutation tickets, previously paid for in money at a time when rates or charges were lower, since the tender of the commutation ticket is not in payment of the transportation demanded, but rather an evidence that the transportation has already been paid for. To the earlier payment, adheres the contract right to demand that

(1) Various I. C. C. Tariffs; e. g., I. C. C. 4004.

(2) Various I. C. C. Tariffs; e. g., I. C. C. 4175, Sec. 7 (g).

the railroad later fulfill its promise of transportation. Nor can it be said that all in similar circumstances are not treated alike, since the offer of the commutation tickets was open to the acceptance of anyone who chose to tie up his funds and give the benefit of them to the railroad. Such benefit is ample reason why Congress has not sanctioned the repudiation of previously-sold commutation tickets.

Admit that Congress could have so empowered the Commission, since all tickets are subject to future legislation regulating interstate commerce (as per Louisville & Nashville R. R. Co., supra), for otherwise police powers or power to regulate commerce might be nullified through contracts. But Congress did not so empower the Commission.

Sec. 22 of the original Interstate Commerce Act, Feb. 4, 1887, c. 104 (24 Stat. 387, amended March 2, 1889, c. 382, s. 9, 25 Stat. 862, and Feb. 8, 1895, c. 61, 28 Stat. 643), is still unrepealed, and authorizes issuance of commutation[3] tickets. In Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 221, speaking of Sec. 22 as providing that nothing in the Act should prevent the "issuance of mileage, excursion or commutation tickets," the Court said: "And it is to be observed that despite the frequent changes in the Act of June 29, 1906, 34 Stat. 584, the provision in question remains in force, although the Interstate Commerce Commission, charged with the administrative enforcement of the Act, has directed the attention of Congress to the importance of defining the scope of such tickets in view of the abuses which might arise from the exercises of the right to issue them. 2 Interstate Commerce Commission Rep. 529, 639."

In Sec. 15a of the Interstate Commerce Act (added by the Transportation Act of 1920, Feb. 28, 1920, c. 91, s. 422, 41 Stat. 488), by providing that the Commission shall fix rates that will yield a definite return, should be held to include (as an incident) a power to order the repudiation of a prior valid agreement instead of reaching the necessary return through general distribution all along the line of rates, yet it is submitted that the cancelling of commutation tickets would not be within the scope of such power. That is, if the Commission had such discretion, the exercise of it, in cancelling these commutation tickets would be an abuse of discretion, since the insignificance of the added revenue to the railroads through substitute sales of tickets (and surely *not* through the retention of any interest on the funds the railroad had meantime enjoyed) could not warrant the order. If there was danger that speculators had procured a large number of the commutation tickets, then, since the tickets might be considered to have been offered only for bona fide purchasers who intended to travel, and not to speculators who would sell to spasmodic travelers and so not increase the railroads' custom, the Commission might perhaps have ordered the railroads not to honor commutation tickets traceable to the hands of speculators.

In the case of commutation tickets, the railroad derives the use of the money; the passenger is expected to take his time in using the tickets; the whole transaction looks to an indefinite future. And it is to be noted that the longer the holder of these commutation tickets took to use them—the further in advance he purchased them—then the greater benefit the railroads derive from the use of the money. Over an extended period, such benefit might far exceed any increase in the rates. When Congress meant the railroad to return money to a shipper for excess charge, it provided for the payment of interest on the money to be refunded. Sec. 15 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, supra, s. 418 (7), 41 Stat. 486. It is not reasonable to suppose, therefore, that Congress had in mind

(3) Cf. I. C. C. v. B. & O. R. R. Co., 145 U. S. 263, 276-280; Penn. R. R. Co. v. Towers, 245 U. S. 6.

cancelling of commutation tickets (previously, and still, authorized) when it said in Sec. 15a (2), supra, that the Commission might "initiate, modify, establish or adjust" rates.

New rates are effective, but that does not contradict that the railroad should fulfill its past contract unless (as in Louisville & Nashville R. R. Co. v. Motteley, supra—the "pass" case—Congress required it.

Repudiation of these commutation tickets by authority of the Commission is hardly less reprehensible than a repudiation of government bonds—especially in view of the fact that under Sec. 15a (5), (10), supra, excess railroad revenue is now to be covered into the treasury of the United States. The Commission having exceeded its authority, its authorization or order is no protection to the railroads, and, as it injures owners of such tickets, should be cancelled.

RAYMOND G. BROWN.

Dover, N. H.

A lawyer was cross-examining an old German about the position of the doors, windows, etc., in the house in which a certain transaction occurred.

"And now, my good man," said the lawyer, "will you be good enough to tell the court how the stairs run in the house?"

The German looked dazed ond unsettled for a moment. "How do the stairs run?" he queried.

"Yes, how do the stairs run?

"Vell," continued the witness, after a moment, "Ven I am opp-stairs dey run down and ven I am down-stairs uey run opp."—Farm and Ranch.

An Italian woman asked in court to state her age, replied: "Between thirty-five and fifty." When pressed to be more explicit she said that she kept exact count of her money and other possessions because someone might rob her of these. "But as no one can steal a year or a day, I do not bother to keep track of them."—Boston Transcript.

ATTORNEY AND CLIENT—TRUST RELATION.

ADDISON v. COPE.

243 S. W. 242.

Springfield Court of Appeals, Missouri, July 8, 1922.

The relation of attorney and client existed between the assignee and maker of a note executed on the former's advice when consulted by the latter, whom he represented as an attorney in several cases, concerning the payee's account, though assignee was also in the business of discounting notes, and there was no litigation concerning the account nor any dispute as to the amount or justness thereof.

Suit by G. D. Addison against J. J. Cope. From a decree satisfactory to neither party, plaintiff appeals, and defendant attempts to appeal. Reversed and remanded, with directions.

McGee & Bennett, of Salem, for appellant.

W. P. Elmer and C. C. Cope, both of Salem, for respondent.

BRADLEY, J. (1) Plaintiff filed his bill in equity to require defendant to surrender a certain note for cancellation upon being reimbursed, and to restrain disposition of said note pending trial, and to have defendant declared to hold said note as trustee. The Court rendered a decree satisfactory to neither party, and plaintiff appealed, and defendant attempted to appeal. Plaintiff has filed here a motion to dismiss defendant's attempted appeal, but since the cause is here on plaintiff's appeal it is not necessary to go into the merits of the motion to dismiss defendant's appeal.

Plaintiff alleges that he has been a resident of Salem, Dent County, Mo., for many years, and that defendant has for many years been a regular practicing attorney in Salem and Dent Couny. That during the year 1920 plaintiff had certain business and legal matters requiring the attention of an attorney at law, among which was an account of $2,787.11 which Swift & Co. held against plaintiff, and that plaintiff employed defendant to represent him in the matter of the Swift account, and all other legal matters with which plaintiff was concerned; that while said account was pending against plaintiff, and while defendant was representing him in connection with the same, defendant, for the purpose of secretly obtaining financial gain over and above his fee, fraudulently represented to plaintiff that Swift & Co. was about to file bankruptcy proceedings

against plaintiff, and also was about to file criminal proceedings against him, and advised plaintiff that in order to avoid such proceedings it would be necesary for plaintiff to give Swift & Co. his promissory note and secure same by a trust deed on real estate which plaintiff had; that reposing confidence in defendant as his counsel and relying upon his advice, plaintiff did on July 24, 1920, execute his promissory note to Swift & Co. in the sum of $2,787.11, due one year after date, with interest from date at 8 per cent, and executed a trust deed on certain described real estate to secure said note; that after the execution and delivery of said note and trust deed, and while defendant was still counseling and representing plaintiff relative to said matter and other matters connected with plaintiff's business and property affairs, defendant, without the knowledge and consent of plaintiff and in pursuance of his original purpose to make financial gain out of the Swift matter other than the fee, secretly entered into negotiations with the agents of Swift & Co. for the purpose of said note and trust deed, and represented to Swift & Co. that plaintiff was insolvent, and that said note was worthless, and that by such representations and defendant's relations to plaintiff, defendant purchased said note and trust deed for $930, and Swift & Co. duly assigned to defendant. Plaintiff alleges that by reason of defendant's relation of attorney and adviser to him that defendant knew of his financial affairs, and knew that the note was solvent, and plaintiff further alleges in effect that under the circumstances defendant ought to be held to hold the note in trust for plaintiff. He further alleges that he has tendered the $930, together with 8 per cent interest, and that he keeps good this tender.

The answer admits that defendant is a regular practicing attorney at Salem, Mo.; admits that plaintiff owed Swift & Co. $2,787.11, and that he gave the note and trust deed, and admits that defendant purchased the note and trust deed, and denies generally all other allegations. The Court found that—

"Defendant purchased the note for $930, and at the time of the purchase defendant was plaintiff's attorney in a divorce case, and two cases wherein the Security State Bank had sued plaintiff on some notes, and another case where plaintiff had sued the Dent County Savings Bank; that said suits involved a very large portion of plaintiff's property, and that because thereof defendant is liable to be held as a trustee in the purchase of the Swift & Co. note, 'but, owing to the fact that defendant took the risk of making such purchase, the Court finds that he should be reimbursed in the amount of money he paid for said note and deed of trust and a reasonable sum for his trouble, services and risk in regard thereto. It is therefore adjudged by the Court that the said defendant holds the said note, amounting to the sum of $2,934.36, the amount which will be due thereon August 31, 1921, as trustee for plaintiff, and plaintiff is entitled under the law to redeem the same, and the Court finds that the proper and equitable amount that should be paid by plaintiff to redeem the said note and deed of trust securing the same is $1,467.18 on August 31, 1921. It is therefore considered and adjudged by the Court that if plaintiff shall pay to defendant, on or before August 31, 1921, the said sum of $1,467.18, the defendant shall deliver the said note to plaintiff, and enter a proper cancellation of the deed of trust securing the same, and upon failure to make such payment or tender thereof the temporary injunction heretofore granted against defendant in this cause is to be dissolved.'"

(2) This is an equity case and is here for trial de novo, and it is our province and our duty to make such disposition as comports with equity and good conscience. Schulz v. Bowers et al. (Mo. Sup.) 223 S. W. 725. While we will accord great deference to the finding on the facts by the chancellor below, yet we are not bound thereby. At the time plaintiff gave the note to Swift & Co. there was much pending litigation to which he was a party. A divorce case was pending in which his wife was seeking a divorce, alimony and judgment for alleged loans to him. In the divorce case a restraining order was issued, prohibiting plaintiff here from disposing of any of his property. After the divorce suit was commenced the Dent County Savings Bank refused to surrender funds plaintiff had on deposit, and this resulted in litigation. Addison v. Bank, 205 Mo. App. 622, 226 S. W. 322. Other suits were filed in addition to the divorce suit and the bank suit mentioned, and defendant was counsel for the present plaintiff in all these suits. The divorce suit reached this court, and was disposed of here on stipulations after the remarriage of plaintiff and his wife.

Plaintiff had been selling fertilizer for Swift & Co. on a commission basis, and had $2,000 of what he called "fertilizer money" on deposit in the Farmers' & Merchants' Bank of Salem. When the domestic storm broke he drew this out with the intention he says of paying or delivering it to Swift & Co., but that he consulted defendant, and defendant told him that if his wife were to get all his property to let her pay his debts. A judgment of debt was rendered against plaintiff in the divorce case for $6,000 and judgment for alimony for $1,500. Defendant signed plaintiff's appeal bond, and plaintiff secured him by a trust deed on his

real property in the sum of $10,000. This trust deed covered the same property as the trust deed securing the Swift & Co. note, and was prior to the Swift & Co. trust deed. Letters written by G. C. Dalton, who was at the time prosecuting attorney and was representing Swift & Co., tend strongly to show that he and defendant had had an understanding from the beginning that if plaintiff gave the note and trust deed to Swift & Co. defendant would buy the note for 33 1/3 cents on the dollar.

With the lapse of time the matrimonial sea somewhat calmed, correspondence continued between Dalton and Swift & Co. relative to the note and relative to defendant buying it. Some few months before defendant purchased the note he postponed the purchase on the excuse of not having the money at that time and not being able to get it. When the matrimonial sea became sufficiently calm to justify adventure, negotiations were opened between plaintiff and his wife, who had been married many years and had children, to reach a reconciliation. Plaintiff testified that all negotiations for reconciliation with his wife were with the knowedge and consent of defendant. The negotiations resulted in a reconciliation and remarriage of plaintiff and his wife. Shortly before plaintiff left for St. Louis for the remarriage he told defendant when the nuptials would be celebrated, and defendant requested that plaintiff send him a telegram when the remarriage was consummated. The marriage occurred in St. Louis, December 18, 1920, and on same day plaintiff notified defendant by telegram. On December 17, 1920, Dalton wrote Swift & Co. for a second confirmation, authorizing him to sell the note to defendant for 33 1/3 cents on the dollar. December 18, 1920, Swift & Co. wired Dalton to accept the 33 1/3 cents on the dollar. On December 18th defendant purchased the note for $930, and paid cash.

(3 The evidence tends strongly to show that the remarriage would result in the cure of all of plaintiff's financial ills. Immediately after the remarriage plaintiff's wife released of record all her judgment liens, which were the greatest debts resting upon plaintiff. The record further shows that plaintiff paid to defendant all the fees demanded in all the litigation mentioned. Defendant justifies his purchase of the note mentioned on the ground that in addition to being a lawyer he was also in the business of loaning money and discounting notes, and that he purchased the note in the usual course of a business transaction, and is entitled to whatever profit he may make and is subject to whatever loss he may sustain. It is sometimes said that there is a quasi maxim to the effect that business has no conscience, but this principle, however much it may prevail in the general business world, has never been recognized in the professional business of a lawyer. While there was no litigation concerning the Swift & Co. account, yet the record discloses, in fact defendant admits, that plaintiff consulted him concerning this account. Defendant did not seem to regard the consultation concerning the Swift account as a professional matter. He contends that, since there was no dispute as to the amount of the account and no dispute as to its justness, the advice he gave should not be magnified into professional advice. Plaintiff, however, says that the consultations and advice given him by defendant concerning the account and the giving of the note and trust deed covered a much wider scope than defendant concedes, and that he proceeded in relation to the account and the giving of the note and trust deed upon the advice of defendant. Defendant states his position as follows:

"Defendant fulfilled all his duties as a lawyer under the terms of his employment in each case in which he was employed, and faithfully executed every trust imposed on him. While he was true and loyal in every respect, that did not preclude him from dealing in notes which plaintiff had executed and delivered in payment of an honest debt. Plaintiff had full knowledge of defendant's brokerage business. Each time plaintiff needed money he came to defendant and executed his note, just as he did to Swift & Co., therefore defendant had a right to expect that plaintiff would pay his honest debt. Defendant knew that plaintiff actually got the fertilizer for which the note was given, and plaintiff always informed defendant that he was going to pay the note, and, acting on this belief, defendant purchased the note. When a lawyer does a brokerage business as well as a law business just because some one who has given his note, or who in the future might execute his note, certainly would not preclude the lawyer from buying such note when the lawyer actually knew the note was given for an honest and valuable consideration, and like the one at bar for the face value."

Both sides have somewhat extensively briefed this cause, but it not necessary to enter upon an extended discussion of the law regulating the relation of attorney and client. Defendant concedes that if the relation of attorney and client existed between him and plaintiff concerning the Swift & Co. account, the note and trust deed, that then he could not deal as he did in relation thereto, and be free from the responsibilities and duties that such relation imposes. Suffice it to say that we think from this record that the relation of

attorney and client existed in regard to the Swift account note and deed of trust.

(4-6) The relation of attorney and client is founded upon trust and confidence and information acquired concerning the subject-matter of the employment while that relation exists cannot be thereafter used by the attorney to the detriment of the client. Eoff v. Irvine et al., 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609. It might be that no detriment measured in dollars and cents comes to plaintiff because of defendant's purchase since he owed the Swift account. But this course of reasoning overlooks the fact that from the beginning Dalton, Swift's attorney, and defendant, according to Dalton, were discussing the sale of the note to defendant for 33 1/3 cents on the dollar. In view of the relation that existed, it was the duty of defendant to advise plaintiff that the Swift matter might or could be settled to his advantage. Instead, however defendant continued on in a multiplicity of litigation, which involved the whole of plaintiff's financial substance without disclosing that the burden of the Swift note might be lessened. That trust and confidence upon which the relation of attorney and client is founded would be shaken, if not shattered, if defendant could, under the facts here, be said to have purchased the note in the course of a business deal wholly free from his relation as counsel for plaintiff. It is better to remain on safe and secure professional ground, to the end that the ancient and honored profession of the law and its representatives may not be brought into disrepute. Courts have consistently held the members of the profession to the strictest account in matters affecting the relation of attorney and client.

(7, 8) The learned chancellor decreed that plaintiff should pay to defendant $1,467.18. This amount was arrived at by allowing defendant approximately $500 for his services in the Swift matter and for the risk he took in buying the note. Plaintiff paid all the fees defendant asked. Defendant was representing plaintiff in many matters, and the fees paid covered all. There can be no compromise judgment here except by consent. Either defendant is entitled to the benefit of his bargain or he is not. He certainly is not entitled to have the judgment of a court of equity that he is entitled to have compensation for the risk. The law frowns most severely upon an attorney taking the risk that defendant took, not because it frowns upon a business transaction, but because the transaction here is so intimately related and connected with the relation of attorney and client. It is our conclusion that defendant should be held to have purchased the Swift note in the capacity of a trustee for plaintiff, and we so hold.

The judgment is reversed and cause remanded, with directions to the trial court to enter up a decree to the effect that plaintiff pay to defendant $930, with 8 per cent. interest, from the date of defendant's purchase of the Swift note, December 18, 1920, and within such time as the trial court shall direct, and that upon such payment the note and deed of trust shall be canceled and the record of the trust deed satisfied, and that the injunction issued be continued in force during the period of time that the court may grant in which to pay said $930 and interest. The court will give plaintiff such time as is reasonable in view of all circumstances obtaining at the time. In the event of plaintiff's failure to pay as directed by the court, then the court is directed to disolve the injunction and dismiss plaintiff's bill, with prejudice.

NOTE—*Attorney Cannot Profit from Claim Adverse to Client's Interests.*—A client has the right to treat all acts of his attorney concerning the interest intrusted to him as done for his benefit; equity and public policy are opposed to an attorney deriving any advantage in relation to the subject matter involved which is obtained at the expense of the client, even though there is no actual fraud on the part of the attorney. 6 C. J. 682.

An attorney employed and consulted as such, to draw a deed, or an application for an original title for land, is in the line of his profession, and is precluded from buying in for his own use any outstanding title. The relation of the attorney in such case to his client is confidential, and whether he acts upon information derived from him or from any other source he is affected with a trust. This rule is on the ground of policy, not of fraud and prevails, although the attorney be innocent of any intention to deceive, and he act in good faith. Smith v. Brotherline, 62 Pa. 461.

Where an attorney who was employed to collect or foreclose a mortgage, instead of foreclosing the same, took a conveyance of the equity of the redemption to himself, instead of his clients; Held, that he took the legal title as a trustee for his clients, and that upon his death the legal estate descended to his heirs at law charged with the trust, and that the clients were entitled to a conveyance from the heirs, upon the repayment of the amount paid by the attorney for the equity of redemption, and the amount due for his services, and the value of the improvements made upon the premises by the heirs before they had notice of the existence of the trust. 5 Paige Ch. (N. Y.) 561.

Where an attorney, employed by an assignee to settle claims with the creditors, compromises the claims, giving his own notes in set-

tlement at the rate of fifty cents on the dollar with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and after seeing that the estate is in fact solvent, have the claims assigned to a third person, who advanced to him the money to pay the notes, and collect the full amount of the claims for the benefit of such third person. Sutliff v. Clunie, 4 Cal. Unrep. Cas. 697, 37 Pac. 224.

A judgment rendered against a succession during the course of its settlement, even though twelve months have expired since it was rendered and no appeal has been taken, cannot be bought by the attorney of the administrator except for the succession. Hoss' Succ., 42 La. Ann. 1022, 8 So. 833.

An attorney who has been consulted about a title to land will not be permitted to purchase an outstanding one, and then set it up in opposition to his client. Where he purchases such outstanding title, he will be deemed to hold it in trust for his client, if the latter desires to claim the benefit of the purchase. Nor does the withdrawal of the attorney from his client's employment leave the former at liberty to purchase the title about which he had been consulted and given his client advice. The relation of client and attorney is founded upon trust and confidence, and information acquired concerning the subject of the employment while the relation exists cannot thereafter be used by the attorney against the client. Eoff v. Irvin, 108 Mo. 378.

An attorney employed by both parties to an agreement for the purchase of land for the sum of $8,000, upon discovering a defect in the title, concealed the fact from one of the parties, and in accordance with a secret agreement with the other procured a conveyance by quitclaim for the sum of $25 to E., his own brother. Held, that his conduct was a gross breach of professional duty, and that E. should be decreed on receiving the purchase money, $25, to convey to the injured party the premises, with covenant against the title of E. and all others claiming under him. Baker v. Humphrey, 101 U. S. 494.

ITEMS OF PROFESSIONAL INTEREST

WRONGFUL ARREST AND RESPONDEAT SUPERIOR.

There has been very general criticism in the legal press of the House of Lords' recent decision in Percy v. Glasgow Corporation (1922, 1 Scots Law Times, 350), and it must be regarded as somewhat of a novelty. The actual judicial phrasing used in the judgments, however, both in the Scots Courts and in the House of Lords, does not seem open to any exception on ground of principle. The action was one of damages for wrongful arrest, and the First Division of the Court of Session held it irrelevant as against the corporation for the reason that their by-laws only gave their tramway servants power to arrest if a passenger refused to give his name and address, and consequently, his arrest being contrary to the by-law, was not within the scope of his authority so as to infer liability for the arrest against the corporation. As the Lord President said: "For the pursuer (plaintiff) to attempt to make the employers liable in these circumstances is impossible. He avers action which was not under the scope of the employees' authority and which he says he knew was not under the scope of their authority."

That certainly expresses the generally accepted understanding of the law hitherto. The limits of the decision referred to may be best gathered from the concluding sentence of Lord Dunedin's opinion: "If the officials are genuinely purporting to act under the by-law, then if they make a mistake either of fact or of law which leads them to arrest wrongously, that is to say, in a way the by-law does not allow, I think the corporations would in that case be liable."—Solicitors' Journal.

CRIMES OF VIOLENCE.—This week, in passing sentence of two years' imprisonment on an Irishwoman convicted of having in her possession eleven incendiary bombs, Mr. Justice Shearman drew attention to the growth of murder and crimes of violence during the last few years. He suggested that there appear to be in existence organizations which glorify "murder and incendiarism," and he appealed to all Christian churches to commence a campaign against these tendencies. But perhaps the learned judge has rather ignored the real cause of this increase of crime. It is one of the inevitable results of a long period of warfare, during which a large section of the population because daily accustomed to scenes of horror and brutality, while the public at large learned, by imperceptible degrees, to lose its respect for the sanctity of human life. Experience shows that such epochs in our history are invariably followed by a great increase of violence and brutality for considerable periods after the termination of the war in which the sentiment has taken root. The Napoleonic wars had exactly the same results and led to a great increase in the severity with which crime was punished, many offences not previously capital being made so in the period which immediately followed on the French Revolution. It was not until the memory of that great war had died away that our severe penal laws were relaxed and finally reformed; this relaxation was followed by a diminution of brutal and violent crimes. It may be anticipated that the influence of time, together with humaner and more rational methods of punishment, will have the same result now.—Solicitors' Journal, July 29, 1922.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attachment**—Surety.—In an action on an attachment bond, reciting the surety's undertaking and promise that, if plaintiff recovered judgment, the attachment defendants would redeliver the attached property to the proper officer to be applied to payment of the judgment or pay the whole value thereof, it was not necessary to join the attachment defendant as a party defendant, though she was the principal in the execution of such undertaking, it appearing plainly from the language thereof that the surety's promise imposed a several as well as a joint liability, in which case the surety may be sued separately, under Code Civ. Proc. § 383.—Ward v. Massachusetts Bonding & Ins. Co., Calif., 208 Pac. 188.

2. **Attorney and Client**—Discontinuance of Cause.—Courts have inherent powers to refuse discontinuance of a cause, when thereby the rights of attorneys under their contracts with their clients would be defeated, if the attempted discontinuance is intended to defraud the attorneys, in which case the Court will permit the litigation to be continued by the attorney.—Frear v. Lewis, N. Y., 195 N. Y. S. 3.

3.——Right of Client.—While an attorney may adopt any course he deems best calculated to secure the object of his employment, and has implied power to use all the usual means to that end, he cannot, under his general authority, bind his client by any act amounting to a surrender in whole or in part of any substantial right.—Barton v. Tombari, Wash., 207 Pac. 239.

4. **Automobiles**—Agency.—Where the owner of an automobile purchased for the use of his family authorized his daughter to take her mother out for a pleasure ride, the daughter was the agent of her father, so as to render him liable for her negligence.—McCrossen v. Moorhead, N. Y., 195 N. Y S. 164.

5.——Contributing Negligence.—Where the driver of an automobile stopped his machine about 20 feet from the crossing, and he and his passengers looked and listened for an approaching train, they were not contributorily negligent in thereafter driving upon the crossing in front of a train which did not sound the statutory signals, though their view in direction from which the train approached was obstructed at the point at which they stopped, but would not have been if they had proceeded a few yards closer to the track before stopping.—Davis v. Davis, Ky., 242 S. W. 870.

6.——Fence.—In action against a town for death of automobile driver killed by fall down embankment defectively fenced in which defendant claimed that the car was traveling at an excessive speed when it left the road, evidence as to the length and weight of the automobile, its position after the accident, and the damage it sustained, was admissible on the issue of the speed at which it was being operated.—Kelsea v. Town of Stratford, N. H., 118 Atl. 9.

7.——Police Power.—An act requiring taxicab owners to put up an indemnity bond of $2,500 is a valid exercise of the police power.—Donella v. Enright, N. Y., 195 N. Y. S. 217.

8.——Public Highway—Under Vehicle Act, § 20a, providing that on all occasions the driver of any vehicle upon the public highway shall travel on the right side thereof, unless the road ahead on the left-hand side is clear and unobstructed for at least 100 yards, an automobilist, driving on the the left side of the highway, resulting in a collision with another automobile, was guilty of negligence in so doing.—Dover v. Archambault, Calif., 208 Pac. 178.

9.——Signal.—Where witnesses for defendant testified that he sounded the proper signals on his horn when his automobile was overtaking plaintiff, who was riding a bicycle, and plaintiff's only testimony contradicting it was that he heard something just before he was struck, but did not know what it was, there was no evidence to support an instruction submitting to the jury negligent failure to sound the horn.—Shipley v. Nelson, Wash., 207 Pac. 1046.

10. **Bankruptcy**—Creditors.—On the bankruptcy of a benefit association, which collected assessments solely for the payment of benefits to the beneficiaries of deceased members, the living members held to have no claim to any of its funds as against the claims of such beneficiaries, who occupy the position of creditors.—Bilyeu v. Lester, U. S. C. C. A., 281 Fed. 310.

11.——Jurisdiction.—After an appeal has been allowed to the Circuit Court of Appeals in involuntary proceedings in bankruptcy, the jurisdiction is transferred from the District Court to the appellate court, and a motion to strike certain pleadings from the record cannot be allowed by the District Court before remand, but should be presented to the Circuit Court of Appeals.—In re Gustin, U. S. D. C., 281 Fed. 320.

12.——Referee.—Evidence showing that, five months before bankruptcy, bankrupt had several thousand dollars on deposit in a bank, where he had denied having an account, that the greater part had been withdrawn by checks payable to "cash", and bankrupt refused to state what had been done with the money, held to sustain an order by the referee requiring him to pay over the amount to his trustee.—Dittmar v. Michelson, U. S. S. C. A., 281 Fed. 116.

13. **Banks and Banking**—Assessment.—Stockholders, who paid illegal assessment made on notice from bank examiner for the purpose of replacing impaired capital and who thereby warded off liquidation for more than a year, during which additional liabilities were incurred by the bank, could not recover amount paid on subsequent liquidation of bank on the ground of such duress, being estopped to assert their rights by failure to act promptly.—Duke v. Force, Wash., 208 Pac. 67.

14.——Estoppel.—Where bank stock was sold because of stockholders' refusal to pay illegal assessment ordered by bank examiner for replacement of impaired capital under Laws 1917, pp. 288, 301, §§ 34, 60, the purchasers, who exercised all the attributes of ownership, attended stockholders' meetings, voted the stock, and did not question the validity of the sale until after the bank became insolvent, could not, on liquidation of bank, avoid liability for the superadded liquidation assessment under Section 35 and Const. Art. 12, § 11, on the ground that the sale was void, and that the purchasers therefore were not stockholders.—Duke v. Mines, Wash., 208 Pac. 75.

15.——Insurance.—Where the cashier of a bank was agent of the insurance company which insured the bank against burglary, and his attention was

called to a clause in the policy limiting recovery for securities stolen while outside of the safe to 10 per cent of their value, and he accepted for the bank a policy containing that clause after attempting to get it changed, the bank, whose directors had authorized him to procure the policy for the bank, knowing him to be the agent of the insurance company, is bound by his acceptance of the policy with that clause in it, and can recover only the amount so limited for securities stolen from outside the safe.—Union Bank v. National Surety Co., Ky., 243 S. W. 13.

16.——Joint Account.—Where a bank account stood in the join names of the husband and the wife, an overdraft was the joint debt of both husband and wife, even though all of the checks except one or two had been drawn by the husband. Popp v. Exchange Bank, Calif., 208 Pac. 113.

17.——Liability.—The fact that stockholders of bank had paid assessment made at the request of bank examiner for replacement of impaired capital did not relieve them from liability for the superadded liquidation assessment.—J. C. Miller Estate v. Drury, Wash., 208 Pac. 77.

18.——Stockholder Debt.—Under Code 1907, § 4829, an action in equity may be brought by a bank to foreclose its lien under Section 3476, on shares of its stockholders for indebtedness of such stockholders to the bank, notwithstanding the procedure prescribed by the statute for the enforcement of such liens; such procedure being cumulative merely.—Rowe v. Bank of New Brockton, Ala., 92 So. 643.

19. **Bills and Notes**—Non-Negotiable.—Where a note (or some collateral agreement known to the indorsee) makes the note payable whenever the payee deems himself insecure, the due date is usually held uncertain, so as to render the note non-negotiable.—People's Bank v. Porter, Calif., 208 Pac. 200.

20.——Presentment.—Where note designated no particular place of payment, and the makers changed their residence after defendants became indorsers and plaintiff holder of the note, and the holder, upon the interest falling due, twice called at the last known residence of the makers, and, finding no one there, mailed a written notice to them at that address, and upon non-payment on the date recited therein mailed notice of dishonor and demand of payment to each indorser, presentment to the makers was excused by the holder's exercise of reasonable diligence under Rem. Code 1915, § 3473.—Wagner v. Broberg, Wash., 207 Pac. 1045.

21. **Breach of Marriage Promise**—Recovery.—Money given in consideration of promise to marry may be recovered on breach of the promise, but not travel expense incurred merely in prosecuting the claim.—Cushing v. Hughes, N. Y., 195 N. Y. S. 200.

22. **Brokers**—Privity of Contract.—Where stock brokerage firm deposited securities owned by others with a bank to secure the stockholders' note, and thereafter the bank sold some of the securities because of default in the payment of the note, owners of securities so sold were not entitled to the sale of the unsold securities and to share in the proceeds thereof, but the owners of such unsold securities, who could trace title thereto, were entitled to the possession thereof; there being no privity of contract between the owners of the sold securities and the owners of the unsold securities.—Asylum of St. Vincent de Paul v. McGuire, N. Y., 195 N. Y. S. 48.

23. **Carriers of Passengers**—Certificates.—Under Transportation Corporations Law, § 26, as added by Laws 1915, c. 667, providing that, unless operators of a bus line obtain consent of municipal authorities, they are not competent to receive a certificate of convenience and necessity, where defendant had no power to receive such a certificate, though it was granted to him, the situation remained the same as if the certificate had not been issued.—New York, O. & W. Ry. Co. v. Griffin, N. Y., 195 N. Y. S. 112.

24.——Passenger.—Where plaintiff presented herself at defendant's station at a time when a train was due there for the receipt of passengers for her destination, and saw a train stop at a proper place substantially at the proper time, and could reasonably act on the supposition that it was the train scheduled to stop, and no warning was given her, and she started to board the train, when it was suddenly started without signal, and without giving her an opportunity to reach a place of safety, though the trainmen knew, or by reasonable care might have known, that it had stopped at a station when another train was due, findings were warranted that plaintiff was a passenger, and that there was negligence in starting the train.—McPartland v. Boston, R. B. & L. R. R., Mass., 136 N. E. 168.

25.——Valuation.—In a proceeding by a street railroad for a permit to increase its fares, it was error to fix the valuation of the company's property at the pre-war cost, less the subsequent depreciations, and not consider the valuation during and after the war.—People v. Public Service Commission, N. Y., 195 N. Y. S. 174.

26. **Charities**—Power to Accept.—A gift of a building to a town in Pennsylvania to be perpetually maintained as a library was not void for lack of power to accept the gift or to agree to maintain a library, as Act Pa. July 20, 1917 (P. L. 1143; Pa. St. 1920, §§ 13761-13789), expressly empowers any municipality to take and hold any property, real or personal, or both, for library purposes and to make appropriations to maintain or aid in the maintenance thereof.—Borough of Town of Clarion v. Central S. B. & T. Co., Col., 208 Pac. 251.

27. **Commerce**—Interstate.—Where three cars loaded with coal had been brought in by a railroad from another State and placed on a siding for the consignee, who had unloaded two of the cars, the shifting of the three cars by the carrier, so as to remove the two unloaded cars to another siding until orders were received to return them to the mine, and to place the loaded car in position for unloading, was a movement in "interstate commerce", so that there may be recovery for the death of an employee resulting from the violation of the Federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.), requiring automatic couplers.—Camp v. Pennsylvania R. Co. N. Y., 195 N. Y. S. 90.

28. **Constitutional Law**—City Zoning.—The Legislature may authorize cities to adopt general zoning ordinances.—City of Utica v. Hanna, N. Y., 195 N. Y. S. 225.

29.——Eminent Domain.—Laws Fla. 1921, c. 8888, creating the Long Branch and Lakeside special road and bridge district, levying a preliminary tax on the lands in the district, and providing for a board of supervisors, with authority to issue bonds and levy an annual tax, held not unconstitutional, as taking the property of a landowner without due process of law, or in conflict with Const. Fla. Art. 16, § 7, providing the Legislature shall not create any office the term of which shall be longer than four years, or Article 3, § 20, prohibiting special or local laws regulating the jurisdiction or duties of any class of officers, except municipal officers.—Columbia Inv. Co. v. Long Branch and L. Sp. R. and B. Dist.—U. S. D. C., 281 Fed. 342.

30.——Jitney Bus.—Birmingham City Ordinance, § 2, subsection c, of which provides that where jitney busses are operated the names of the highways to be used and each terminus of the route shall be indicated in the application for license, Section 4, that only the routes designated shall be used for operating such busses, and Section 4, subsec. 2, that it shall be unlawful to operate "any motor or jitney bus as a taxicab or any taxicab as a motor or jitney bus, except in compliance with the terms of this ordinance", is a valid exercise of the police power, pertaining to the use of city streets, and is not contrary to Acts 1911, p. 648, § 32, forbidding local authorities from requiring of chauffeurs permits for the use of public highways other than as therein provided, and not violative of Const. U. S. Amend. 14, nor of any rights granted by Alabama Constitution.—Giglio v. Barrett, Ala., 92 So. 668

31. **Contracts**—Consideration.—Although buyer retains privilege of canceling order before shipment, a right in seller to ship any time within

three months, existing for however short a time after acceptance, carries at least the right, which buyer cannot nullify, to ship at time of acceptance, and this constitutes sufficient consideration to establish a valid contract.—Gurfein v. Werbelovsky, Conn., 118 Atl. 32.

32. **Corporations**—Action Against Directors.—Ordinarily a creditor of a corporation must exercise his remedy at law by obtaining a judgment against the corporation and by the return of execution unsatisfied, but where by the act of the corporation, or for any other cause, it is impossible for the creditor to obtain such a judgment, the creditor can maintain an action against the directors, even if no judgment has been obtained against the corporation.—Sherill Hardwood L. Co. v. N. Y. Bottle Box Co., N. Y., 195 N. Y. S. 22.

33.——Agency.—An officer of a corporation, who two days before he made an offer of employment and for some time prior thereto was engaged in organizing its staff of employees, was authorized to bind it by such offer.—Safford v. Morris Metal Products Corporation, Conn., 118 Atl. 37.

34.——Fraud.—False representations that stock sold was worth a certain amount per share, and was paying certain dividends, are material and fraudulent.—Bowe v. Provident Loan Corporation, Wash., 208 Pac. 22.

35.——Organization.—The directors of a corporation have no power to issue capital stock to themselves for services rendered in organizing the corporation and selling stock, unless authorized by the charter, by-laws, or the stockholders, since it is unquestionably the duty of directors to use all reasonable efforts in organizing the company they have undertaken to serve according to the best of their ability, and one duty is to provide for the subscription and payment of the capital stock (citing Words and Phrases, Organize).—Lofland v. Cahall, Del., 118 Atl. 1.

36.——Patents.—Where corporation obtained letters patent by making application therefor, after 10 per cent of the capital stock subscribed had been paid to the treasurer in cash, a stock subscription could be paid for by the transfer of property at a just valuation, though the certificate of incorporation did not state that the stock was to be paid for in property, notwithstanding General Incorporation Act April 29, 1874, § 17 (P. L. 73), as amended by Act April 17, 1876, § 4 (P. L. 30; Pa. St. 1920, § 5649).—Krebs v. Oberrender, Pa., 118 Atl. 19.

37.——Stocks.—It is the general rule that a stock certificate is only evidence of the ownership of the interest in the corporate assets which the shares represent, and that the stockholder's interest may be reached or subjected without obtaining possession of the certificate, and there is nothing in the law of Louisiana in conflict with such rule.—Columbia Brewing Co. v. Miller, U. S. C. C. A., 281 Fed. 289.

38. **Death**—Measure of Damages.—The damages recoverable for death under the Federal Employers' Act (U. S. Comp. St. §§ 8657-8665) are purely compensatory, and in determining the amount of damages recoverable by a mother for the death of a minor unmarried son it is proper for the jury to consider the relations of the parties and the dependency of the mother for support upon his wages, and in determining the present value of contributions continuing beyond minority the jury should not be restricted to an interest basis, but should use their sound judgment.—Walker v. Missouri Pac. Ry. Co., Mo., 243 S. W. 261.

39. **Eminent Domain**—Railroad.—Under Pub. St. 1882, c. 49, § 14, a town would be liable in damages for land belonging to a railroad company condemned and taken in laying out a public footway under the railroad tracks.—Directors of Boston & A. R. Co. v. Town of Brookline, Mass., 136 N. E. 147.

40 **Food**—Police Power.—The use of wax paper or other means to retard evaporation of moisture in bread may be required for the purpose of keeping it in good state of preservation for 24 hours as an incidental result of a police regulation establishing standards of minimum and maximum weights for loaves of bread.—Jay Burns Baking Co. et al. v. McKelvie, Governor, Neb., 189 N. W. 383.

41. **Fraud**—Statements by Salesman.—Statements by the salesman to the prospective purchaser of a truck as to the quantity of business the purchaser would get under a milk route contract if he was able to obtain the contract were manifestly statements based on information the salesman procured from others, and did not give the purchaser a right of action for fraud after he purchased the motor truck to carry out the contract, where it appeared that he negotiated for the milk route contract before buying the truck, and he himself testified that, if the milk route contract had been fully performed, he would have been Satisfied.—Badley v. Acme Motor Truck Sales Co., Wash., 207 Pac. 1061.

42. **Frauds, Statute of**—Independent Contract.—If, after building contractor's death, the owner of the building made a new promise based on a sufficient consideration to pay for all the materials theretofore furnished the contractor, all of which were on the ground, it would not be a promise to answer for the debt, default, or miscarriage of another, but an entirely original and independent undertaking upon which recourse could be had against the promisor.—Lake Union Brick & Fireproofing Co. v. MacWhinnie, Wash., 207 Pac. 1060.

43.——Subsequent Writing.—A written agreement for the erection of a building by defendants, to be occupied by the plaintiff for a period of 10 years, was not modified by a subsequent writing which was not signed by the parties, nor by a subsequently executed oral agreement.—Mustar v. Russell, Wash., 207 Pac. 225.

44. **Highways**—Collision.—Defendant who drove a heavy motor car on a slippery pavement during a dark and stormy night at a speed of from 20 to 25 miles an hour, following at a distance of about 40 to 50 feet in the rear of another car, which he knew would likely stop at any time to discharge passengers, was negligent, and he was liable for damages suffered by an approoching car in a collision with his car when he turned out to pass the car in front, regardless of the failure of the driver of the latter car to signal when about to stop.—Knudson v. Bockwinkle, Wash., 208 Pac. 59.

45.——Collision.—Testimony as to position of motorcycle at about the time of a collision, the marks of the wheels on the surface of the road, and the position of the vehicles after the accident may be sufficient to make a prima facie case of violation of Highway Law, § 286, subd. 9, and General Highway Traffic Law, § 12, subd. 6.—Helmer v. Wirtz, N. Y., 195 N. Y. S. 57.

46.——Right of Action.—Since Acts 1919, c. 233, § 11, does not require a dealer to register motor vehicles acquired by him, and provides that they shall be regarded as registered under his distinguishing number or mark until sold, and that a dealer may loan to a purchaser his number plate for a period not exceeding five days, a purchaser who had not registered his vehicle has a right of action for a highway accident during this period, notwithstanding his vehicle still carried numbers assigned to it by the seller to the dealer, which under other circumstances might violate Section 13, imposing a penalty for not carrying proper markers; Section 44, debarring recovery for an injury in case of violation of Sections 8-12, not including Section 13.—Bohmann v. Perrett, Conn., 118 Atl. 42.

47. **Insurance**—Agency.—Secret limitations on the actual authority of agent of insurance company could not affect insured relying upon a contract made within scope of agent's apparent authority.—Reiter v. Northwestern International Ins. Co., Mo., 243 S. W. 197.

48.——Agency.—Where the by-laws of a fraternal benefit society provided, as permitted by Rev. St. 1919, § 6418, that the clerk of a local camp was not authorized to waive any of the by-laws of the society, the clerk had no authority to waive a provision of the by-laws that the society was not liable for death directly traceable to certain extrahazardous occupations, but permitting the certificate to remain in force as to liability for death resulting from any other cause, as he might have waived a provision requiring additional payment for the extrahazardous occupation by thereafter accepting the original payment with knowledge of the change of occupation.—Williams v. Modern Woodmen of America, Mo., 243 S. W. 272.

49.——Application.—The insured died of pulmonary tuberculosis eight months after the policy was issued. In her application, made a part of the contract, she was asked, "Give name and address of physician last consulted", and she answered, "Never had a doctor". In an action upon the policy, the evidence showed conclusively that within the three weeks preceding such statement, she went twice to a physician for treatment, who told her that she had weak lungs and catarrh, and prescribed for her. It also showed conclusively that such false representation was made knowingly and willfully. Held, that a verdict should have been directed for the defendant insurance company.—Kerpchak v. John Hancock Mut. Life Ins. Co., N. J., 117 Atl. 836.

50.——Beneficiary.—The right of the beneficiary named in benefit certificate is not a vested right, and the member has a right to change the beneficiary, though the beneficiary may, under certain circumstances claim a lien on the fund in court.—Goggin v. Mutual Aid Union, Mo., 243 S. W. 244.

51.——Oral Agreement.—Agreement to transfer fire insurance covering a stock of goods from one building to another was valid, though made orally.—First Nat. Bank v. Home Ins. Co., Pa., 118 Atl. 17.

52.—Parties.—An insurance policy, indemnifying for the loss of property by a felonious abstraction from a building "actually occupied by the assured" and belonging to assured, or a "relative of the assured permanently residing with the assured", did not cover a theft of property belonging to his widow, occurring after his death.—Goldstock v. Fidelity & Deposit Co. of Maryland, N. Y., 195 N. Y. S. 94.

53.——Reinstatement.—Under accident policy for insurance by the month, premiums to be paid in advance, where a premium was paid after the policy had lapsed by non-payment, held, in view of policy provision that payment after lapse should reinstate the policy from date of payment only, that payment extended insurance for a month from date of payment, although payment was made on the 22d day of the month, and the policy provided that payment of any past-due premium should not reinstate the policy beyond the first day of the succeeding month.—Fallis v. Massachusetts Bonding & Ins. Co., Mo., 242 S. W. 217.

54.——Representations.—Statements in an insurance contract, that it should be void if the interest of insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by insured is fee simple, did not amount to a warranty or a term of the policy, but merely a representation that the facts were true or that certain acts would be performed in the future, and if untrue, or if the facts are unperformed, this untruth or failure amounts to a misrepresentation.—Hoffman v. Mutual Fire Ins. Co., Pa., 117 Atl. 917.

55.—Suicide.—The law presumes that a self-inflicted injury causing death was accidental, and not suicidal, in the absence of any evidence tending to rebut the presumption.—Trembley v. Fidelity & Casualty Co., Mo., 243 S. W. 201.

56.——Unlicensed Operator.—The operator of a motor vehicle by an unlicensed person, in violation of Gen. Laws, c. 90, §§ 10, 20, but without knowledge on her part that her license had expired, did not, on the ground of public policy, defeat liability on a policy issued to her by a corporation organized under Gen. Laws, c. 175, § 47, and insuring her against loss from liability for personal injuries.—McMahon v. Pearlman, Mass., 136 N. E. 154.

57. **Intoxicating Liquors**—Sale.—The Legislature has the power to regulate the sale of non-intoxicating liquors for the purpose of rendering effective the prohibition against the sale of intoxicating liquors.—Alby v. Smith, Wis., 189 N. W. 493.

58.——Search Warrant.—Where a search warrant was issued upon affidavit of the sheriff which stated that intoxicating liquor was being bought, sold, manufactured, and given away at the home of accused, it was valid, though the sheriff testified that he did not know positively that there was any liquor in the house.—State v. Shaffer, Wash., 207 Pac. 229.

59. **Landlord and Tenant**—Lease.—The acceptance of the rent reserved in a five-year lease given by the owner's father did not give life to the lease, but amounted merely to an oral assent, creating no interest other than a tenancy at will, under Gen. Laws, c. 183, § 3.—Hixon v. Starr, Mass., 136 N. E. 186.

60.——Possession.—Under Civil Practice Act, § 1410, subd. 2-a, a landlord could not recover possession, in summary proceedings, of a four-story building against tenant using the basement floor and the fourth floor for himself and family for dwelling purposes, though he rented the three other floors to lodgers.—Farrow v. Martin, N. Y., 195 N. Y. S. 244.

61. **Master and Servant**—Railroad.—Where ore cars of a railroad used in interstate commerce were no longer required for carrying ore, but were reconstructed for carrying limestone by placing thereon a superstructure which raised the height of the sides above the 36 inches permitted by regulations of the Interstate Commerce Commission for cars having no ladder on the side, and some of the care had been so used for five years, and all would be so used as long as the limestone traffic continued, the superstructure was not a mere temporary addition to the cars, but the placing of it on the cars, without also placing ladders, subjected the railroad company to the penalty for violation of the order.—United States v. Duluth, S. S. & A. Ry. Co., U. S. D. C., 281 Fed. 347.

62.——Safe Place.—A mine pumper, whose duty is to pump from the floors of the mine rooms the water accumulating thereon, owes no duty to inspect the roof of the rooms before he enters them, but he can assume that the roof is safe, unless he is warned to the contrary.—Elkhorn Coal Corporation v. Bumpass' Adm'r, Ky., 243 S. W. 32.

—63. **Mines and Minerals**—Location.—Where a location for oil and prospecting was made February 16th, but no actual discovery was perfected thereunder, the land in question was open to entry under the mineral land laws of the United States on August 29th following, and where plaintiffs entered and took possession of the land lawfully, and duly staked and marked the boundaries under their location, and duly recorded the location notice, their acts indicated the extent of possession taken pursuant to the location.—Sparks v. Mount, Wyo., 207 Pac. 1099.

64. **Municipal Corporations**—Building Zone.—Building zone resolution of the city of New York, requiring premises in certain specified residence districts to be used for dwelling or other enumerated purposes, including "philanthropic or eleemosynary uses or institutions other than correctional institutions", held not to prohibit the use of a building within such district for the publication and circulation of Bibles without profit.—Cromwell v. American Bible Society, N. Y., 195 N. Y. S. 217.

65.——City Charter.—Operation of crosstown bus line by the city under agreement giving owner of bus line the revenue therefrom, held violative of Const. Art. 8, § 10, prohibiting a city from giving or loaning money to or in aid of any individual or corporation, and from incurring debts except for city purposes.—Belt Line Ry. Corp. v. City of New York, N. Y., 195 N. Y. S. 203.

66. **Negligence**—Privey of Contract.—An owner of a gravel pit, who sold gravel to the town and was working for the town in loading it, was under no duty to provide another employee of the town a safe place to work or to warn him of risks arising out of his employment.—Wright v. Sears, Mass., 136 N. E. 151.

67. **Principal and Agent**—Instructions.—In an action by a purchaser of land against a vendor to recover money paid to one alleged to be the vendor's agent, where there was evidence that plaintiff's transactions with the alleged agent occurred in the vendor's office, that vendor's office agent referred plaintiff to the alleged agent for information as to conditions of the sale of selling lots, that the alleged agent gave plaintiff a receipt for an advance payment stating that it was on account of purchase of property of the vendors, and that after the alleged agent had defaulted in agreement to build a house for plaintiff on the land purchased defendant had stated that plaintiff was not to worry and that things would be all right, a refusal to direct a verdict for defendant on the ground of lack of evidence of agency was proper.—Culver v. Nichols, Md., 117 Atl. 873.

68. **Sales**—Cancellation.—Where seller, although without right to do so, canceled the contract, the buyer had the right to tender back what goods he had received under it, if he was willing to acquiesce in the cancellation, and on so doing would not be liable for the purchase price of such goods.—Peierls, Buhler & Co. v. Goldstein, N. Y., 195 N. Y. S. 142.

69.——Delivery.—Where plaintiff's predecessor in interest contracted to sell defendant a specified piano, and to furnish the use of another piano until the one sold was delivered, plaintiff is not entitled to retake the substituted piano until delivery of the piano sold or tender back of the consideration paid.—Sitton v. Keith, Wash., 207 Pac. 1049.

70.——Delivery.—Even though goods are consigned to the purchaser, yet, if the vendor draws for the price, bill of lading attached, this sufficiently evidences his intention to reserve title and right of disposition until the draft is paid.—Armstrong v. Wilcox, Ala., 92 So. 643.

71.—Indefinite.—Where a contract to purchase "$4,000 worth of shoes", provided that the styles, sizes and prices were to be selected later, the subject-matter being too indefinite to be capable of identification, the contract was incomplete, uncertain, and not a binding obligation.—Gordon v. Emerson Shoe Co., Tex., 242 S. W. 791.

72.——Warranty.—Where seller of truck knew of the work the truck was expected to do, and the buyer relied on seller's representations, the contract being silent on the subject of a warranty, there was an implied warranty that the machine was sufficient for the purpose intended, although the truck was a second-hand one.—T. W. Little Co. v. Fynboh, Wash., 207 Pac. 1064.

73. **Street Railroads**—Street Cars.—Rev. Code of City of St. Louis, § 1301, relating to speed of automobiles and horseless vehicles, was not applicable to street cars, in view of Section 1294, and it was reversible error to permit plaintiff to read it in evidence in an action for personal injuries and damages to his automobile at street intersection in collision with a street car.—Bruckman v. United Rys. Co. of St. Louis. Mo., 242 S. W. 686.

74. **Taxation**—Labor Unions.—Where labor unions own a beneficial interest in and jointly use property, the legal title to which is in a holding corporation, the fact that the labor unions dispense charity to their indigent members and their families does not render the holding company in its corporate capacity a "charitable institution", whose property is exempt from taxation, especially where no part of its revenue received from the unions is expended by the corporation for charity.—Nashville Labor Temple v. City of Nashville, Tenn., 243 S. W. 78.

75.——Partnership.—Where a non-resident died March 30, 1917, having a credit representing accrued profits, but not furnishing the basis for additional profits, in a co-partnership doing business in New York and Illinois, the credit was not an "interest in a partnership business" within the State, subject to Tax Law, § 220, subd. 2, but was "intangible property", under Section 243, and not taxable.—In re Hanson's Estate. N. Y. 195 N. Y. S. 255.

76. **Torts**—Labor Union.—Where representatives of a labor union, for the purpose of securing steady employment for union men, induced manufacturer to breach his contract with plaintiff, of which they had notice, they were liable for the resulting damages.—R. & W. Hat Shop v. Sculley, Conn., 118 Atl. 55.

77. **Workmen's Compensation Act**—Independent Contractor.—Where the owner of a building engaged a carpenter to make repairs the carpenter to furnish the materials and labor, a workman employed by the carpenter was not an employee of the owner, so as to be entitled to compensation, under the Workmen's Compensation Law, though on particular occasions, in the absence of the contractor, a representative of the owner gave instructions as to the particular places where he desired the work to progress and the particular kind of work to be done.—Bache v. Salvation Army. N. Y., 195 N. Y. S. 151.

78.—Independent Contractor.—A carpenter, who was engaged by the owner of a building to make repairs to the roof and veranda of the building, and who did the work in his own way and at his own time, without direction from the owner, except indication of the places to be repaired, was an "independent contractor", and not an "employee", within the Workmen's Compensation Law; the test being that a contractor is subject to the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.—Ball v. Bertelle's Estate, N. Y., 195 N. Y. S. 150.

79.——Independent Contractor.—One injured while cutting wood under a verbal contract according to specifications at a fixed price per cord for that cut by himself and others whom he hired, using his own tools and controlling the hours of work and the amount of work done, held an independent contractor, and not an employee within Workmen's Compensation Act.—Gross v. Michigan Iron & Chemical Co., Mich., 189 N. W. 4.

80.—Independent Contractors.—Mere swamp laborers, earning their livelihood as members of a gang constituting part of a sawmill company's logging outfit, and upon whom the company was more or less dependent for keeping the outfit running and over whom it had absolute control in the matter of allowing them to go to work or discontinue their work, were not "independent contractors," but within the protection of the Workmen's Compensation Act, though they worked by the piece and were largely left to themselves and were more or less free to abstain from work when they pleased, though expected to work with some degree of regularity.—Bell v. Albert Hanson Lumber Co., La., 92 So. 350.

81.——Medical Treatment.—Under Workmen's Compensation Act, § 18, providing for medical aid, the employer may not require an injured employee, as a condition to compensation, to submit indefinitely to medical treatment by a physician appointed by the employer, in order to demonstrate the permanency vel non of his injury, and the procedure should rest in the discretion of the trial court.—Ex Parte Sloss-Sheffield Steel & Iron Co., Ala., 92 So. 458.

82. **Wills**—Interest of Survivor.—Where there died, unmarried and without issue and before testatrix, one of two grandchildren, to each of whom by clause 11, $3,000 was bequeathed, to be held in trust for them "on exactly the same terms and conditions * * * as is * * * set forth in paragraph 13", bequeathing the residue in trust for them, the $3,000 legacy of the deceased grandchild goes to the survivor, to be held and administered according to the will, as under the terms of clause 13 does deceased's share in the residue under such circumstances.—Davis v. Jenks, N. H., 117 Atl. 815.